



COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

41 CFR Part 51-11

RIN 3037-AA04

Touhy Regulations

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) is proposing procedures to use in responding to subpoenas or other official demands for information and testimony served upon itself or its employees.

DATES: Comments must be received by September 19, 2017.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, to the Federal Rulemaking Portal at:

<http://www.regulations.gov>.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Timi Kenealy, (703) 603-2100, Email:

CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Background

The Committee, operating as the U.S. AbilityOne Commission, administers the AbilityOne Program pursuant to the authority of 41 U.S.C. 8501. Through this program, employment opportunities are provided to people who are blind or severely disabled through the provisions of products and services to the Federal Government.

Pursuant to 5 U.S.C. 301, the head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. The part does not authorize withholding information from the public or limiting the availability of records to the public.

The United States Supreme Court held in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), that the head of a federal agency may make the determination on his/her sole authority to produce documents and authorize employee's testimony in response to a subpoena or other demand for information.

This proposed regulation will govern the Committee's procedures for authorizing or denying such demands. In addition to updating this section for the Touhy case, the Committee is taking this opportunity to make technical corrections to include changes to the mailing address and changing "JWOD" to "AbilityOne" the operating name of the agency since 2010. Changes to this section of the CFR were last made in 1994.

Regulatory Analysis

Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563,

Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule benefits the public and the United States Government by providing clear procedures for members of the public and Government employees to follow when official testimony or official documents, records, files or information are sought from the Committee or from Committee personnel in connection with legal proceedings. This rule has not been designated a significant regulatory action.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2016, that threshold is approximately \$146 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96-354, Regulatory Flexibility Act

The Committee certifies this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. Ch. 6) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule will provide clarity to U.S. Government personnel and outside counsel on the proper rules and procedures to serve process on U.S. Government officials in their official capacity and to obtain official U.S. Government testimony or documents

for use in legal proceedings. Therefore, the Regulatory Flexibility Act, as amended, does not require the Committee to prepare a regulatory flexibility analysis.

Executive Order 13132, Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule will not have a substantial effect on the States; the relationship between the National Government and the States; or the distribution of power and responsibilities among the various levels of Government.

Public Law 96-511, Paperwork Reduction Act

It has been determined that this rule does not impose reporting or record keeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

List of Subjects in 41 CFR Part 51-11

Administrative practices and procedures, Courts, Disclosure, Exemptions, Government employees, Subpoenas, Records, Testimony.

For the reasons set forth above, the Committee proposes to amend chapter 51 of title 41 by adding part 51-11 to read as follows:

Part 51-11 – Production or Disclosure in Federal and State Proceedings

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Authority: 41 U.S.C. 85039d.

Part 51-11 – Production or Disclosure in Federal and State Proceedings

§51-11.1 Scope and purpose.

(a) This part sets forth policies and procedures of the Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) regarding the testimony of current and former employees as witnesses and the production or disclosure of Committee documents or information:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, when a demand pursuant to a subpoena, order or request (collectively referred to in this part as a “demand”) of a court or other authority is issued for such material, testimony, or information.

(b) The Committee intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving the Committee in controversial issues not related to its functions;

(3) Prevent the misuse of the Committee's employees as involuntary expert witnesses for private interests or as inappropriate expert witnesses as to the state of the law;

(4) Maintain the Committee's impartiality among private litigants where neither the Committee nor any other Federal entity is a named party; and

(5) Protect sensitive, confidential information and the deliberative processes of the Committee.

(c) In providing for these requirements, the Committee does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of the Committee. The procedures specified in this part, or the failure of any Committee employee to follow the procedures specified in this part, are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

§51-11.2 Applicability.

This part applies to demands and requests to employees of the Committee in legal proceedings, for factual or expert testimony relating to official information or for production of official records or information. However, it does not apply to:

(a) Demands for a current Committee employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the Committee;

(b) Demands for a former Committee employee to testify as to matters in which the former employee was not directly or materially involved while at the Committee;

(c) Requests for the release of non-exempt records under the Freedom of Information Act, 5 U.S.C. 552 (41 CFR part 51-8), or the Privacy Act, 5 U.S.C. 552(a) (41 CFR part 51-9); and

(d) Congressional or Government Accountability Office (GAO) demands and requests for testimony or records.

§51-11.3 Definitions.

As used in this part:

Committee means the Committee for Purchase From People Who Are Blind or Severely Disabled.

Committee employee or employee means:

- (1) Any current or former officer or employee of the Committee;
- (2) Any other individual hired through contractual agreement by or on behalf of the Committee or who has performed or is performing services under such an agreement for the Committee; and
- (3) Any individual who served or is serving in any consulting or advisory capacity to the Committee, whether formal or informal.
- (4) Provided, that this definition does not include persons who are no longer employed by the Committee and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the Committee.

Demand means a subpoena, request, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or information

related to, for the appearance and testimony of a Committee employee that is issued in a legal proceeding.

General Counsel means Committee General Counsel or Committee employee to whom the General Counsel has delegated authority to act under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of discovery, litigation and informal requests by attorneys or others involved in legal proceedings seeking interviews or the like.

Records or official records and information mean all documents and materials, however stored, that is in the custody and control of the Committee, relating to information in the custody and control of the Committee, or acquired by a Committee employee in the performance of his or her official duties or because of his or her official status, while such individual was employed.

Request means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

§51-11.4 General prohibition.

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Committee shall, in response to a demand, produce any record contained in the files of the Committee, or disclose any information relating to or based upon record contained in the files of the Department, or disclose any information or produce any record acquired as part of the performance of that person's official duties or because of that person's official status without prior written approval of the General Counsel in accordance with §51-11.9.

(1) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the General Counsel. The General Counsel shall follow procedures set forth in §51-11.8.

(2) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the General Counsel. Any authorization for testimony by a present or former employee of the Committee shall be limited to the scope of the demand as summarized in such statement.

(3) When information other than oral testimony is sought by a demand, the General Counsel shall request a summary of the information sought and its relevance to the proceeding.

(b) In any federal or state case or matter in which the United States is a party, the General Counsel is authorized to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such

testimony, and relevant unclassified material, documents, or information secured by the employee or former employee of the Committee, as the General Counsel shall deem necessary or desirable to the discharge of the attorney's official duties: *Provided*, Such an attorney shall consider, with respect to any disclosure, the factors set forth in §51-11.7.

(1) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the agency attorney handling the case or matter.

(2) [Reserved]

(c) In appropriate cases, the General Counsel shall notify the United States Department of Justice (DOJ) of the demand and coordinate with the DOJ to file any appropriate motions or other pleadings.

§51-11.5 Service of demand.

(a) Written demands directed to the Committee or requests for official records, information or testimony shall be served in accordance with the requirements of the Federal Rules of Civil or Criminal Procedure, or applicable State procedures, as appropriate. If the demand is served by U.S. mail, it should be addressed to the General Counsel, Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, VA 22202. The Committee's acceptance of service of a demand shall not constitute an admission or waiver of any objection with respect to the propriety of

jurisdiction, service of process, venue or any other defense in law or equity available under applicable law.

(b) If any doubt exists, whether a demand relates to purely personal matters or arises out of the performance of official duties, copies of the demand may be delivered to the General Counsel for such determination.

§51-11.6 Filing requirements for demands for documents or testimony.

Compliance with the following requirements is required when issuing demands or requests for official records, information or testimony.

(a) Requests must be in writing and must be submitted to the General Counsel. If a subpoena is served on the Committee or a Committee employee before submitting a written request and receiving a final determination, the Committee will object to the subpoena on grounds that it was not submitted in accordance with this part.

(b) Written requests must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show the relevance of the information sought;

(3) A detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on the Committee to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a Committee employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each Committee employee for time spent by the employee to prepare for testimony, in travel, and for attendance at the legal proceeding.

(c) The Committee reserves the right to require additional information to complete any request where appropriate.

(d) Requests should be submitted at least 45 calendar days before the date that records or testimony is required. Requests submitted in less than 45 calendar days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

§51-11.7 Factors the Committee will consider.

The General Counsel in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to an appropriate demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (c) The Committee has an interest in the decision that may be rendered in the legal proceeding;
- (d) Allowing such testimony or production of records would assist or hinder the Committee in performing its statutory duties or use the Committee resources in a way that will interfere with the ability of the Committee employees to do their regular work;
- (e) Allowing such testimony or production of records would be in the best interest of the Committee or the United States;
- (f) The records or testimony can be obtained from other sources;
- (g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

- (h) Disclosure would violate a statute, Executive order or regulation;
- (i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or would otherwise be inappropriate for release;
- (j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;
- (k) Disclosure would result in the Committee appearing to favor one private litigant over another private litigant;
- (l) Disclosure relates to documents that originate from another agency;
- (m) A substantial Government interest is implicated;
- (n) The demand or request is within the authority of the party making it;
- (o) The demand improperly seeks to compel a Committee employee to serve as an expert witness for a private interest;
- (p) The demand improperly seeks to compel a Committee employee to testify as to a matter of law; and/or
- (q) The demand or request is sufficiently specific to be answered.

§51-11.8 Processing demands or requests.

- (a) After service of a demand or request, the General Counsel will review the demand or request and, in accordance with the provisions of this part, determine whether, or under what

conditions, to authorize an employee to testify on matters relating to Committee records and/or produce records.

(b) The Committee will process requests in the order in which they are received. Absent exigent or unusual circumstances, the Committee will respond within 45 calendar days from the date of receipt. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this part where a waiver is considered necessary to promote a significant interest of the Committee or the United States or for other good cause.

§51-11.9 Final determination.

The General Counsel makes the final determination on demands and requests for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of a Committee employee.

§51-11.10 Restrictions that apply to testimony.

(a) Conditions or restrictions may be imposed on the testimony of the Committee employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that they will seek to file the transcript of the testimony under seal and that it will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript or testimony be provided to the Committee at the requester's expense.

(b) The Committee may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information;

(2) Testify as to any information outside the scope of the General Counsel's authorization (*see* §51-11.7); or

(3) For a current Committee employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the Committee unless testimony is being given on behalf of the United States whether or not the United States is a party.

§51-11.11 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the Committee may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original Committee records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official Committee records, and they are not to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes.

§51-11.12 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination previously referred to, the General Counsel when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

§51-11.13 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay the demand, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has not been authorized to provide the requested testimony or produce documents, and respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

§51-11.14 Fees.

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the Committee.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by the Committee in its Freedom of Information Act regulations at 41 CFR part 51-8.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, travel time and expenses, and for attendance in the legal proceeding.

(d) *Payment of fees.* Witness fees for current Committee employees and any records certification fees shall be paid by check or money order presented to the Committee made payable to the United States Department of Treasury. Applicable fees for former Committee employees' testimony must be paid directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records.* The Committee Records Manager may certify that records are true copies in order to facilitate their use as evidence. Certification

requests require 45 calendar days for processing and a fee of \$15.00 for each document certified.

(f) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) *De minimis fees.* Fees will not be assessed if the total charge would be \$10.00 or less.

§51-11.15 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the Committee, or as ordered by a Federal court after the Committee has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former Committee employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current Committee employee who testifies or produces official records and information in violation of this part may be subject to disciplinary action.

Patricia Briscoe, *Deputy Director, Business Operations Pricing and Information Management.*
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